

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 29, 2006 Session

BILLIE JOE HENDERSON v . STATE OF TENNESSEE

Appeal from the Criminal Court for Knox County
No. 71679 Mary Beth Leibowitz, Judge

No. E2005-00806-CCA-R3-PC - Filed June 9, 2006

The petitioner, Billie Joe Henderson, was convicted of first degree murder in 1998. This Court affirmed the conviction on appeal. See State v. Billy Joe Henderson, No. 03C01-9804-CR-00139, 1999 WL 398087, at *1 (Tenn. Crim. App., at Knoxville, June 18, 1999), perm. app. denied, (Tenn. Nov. 22, 1999). Subsequently, the petitioner filed a pro se petition for post-conviction relief. The petition was dismissed without a hearing and the petitioner appealed. On appeal, this Court affirmed in part, reversed in part and remanded the matter to the post-conviction court for an evidentiary hearing based on the determination that the petitioner had stated a “colorable claim” for relief. See Billy Joe Henderson v. State, No. E2001-00438-CCA-R3-PC, 2001 WL 1464544, at *1 (Tenn. Crim. App., at Knoxville, Nov. 19, 2001). On remand, the post-conviction court held an evidentiary hearing on the petition. After the hearing, the petition was denied. The petitioner appeals, arguing that the post-conviction court incorrectly denied the petition for post-conviction relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which ALAN E. GLENN, and J. C. McLIN, JJ., joined.

Jonathan D. Cooper, Knoxville, Tennessee, for the appellant, Billie Joe Henderson.

Paul G. Summers, Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Leslie Nassios, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On February 24, 1998, the petitioner was convicted of first degree murder by a jury and sentenced to life imprisonment. He appealed the conviction. On appeal, this Court summarized the facts as follows:

The appellant's conviction resulted from the fatal stabbing of the victim, Steve Wells, following an evening of drinking and dancing at Cotton Eyed Joe's, a dance club in Knoxville. Brenda Wells, the victim's wife, called her good friend, Cindy Hurst, and together they planned an evening at Cotton Eyed Joe's with Mr. Wells and the appellant. Ms. Hurst had been dating the appellant for approximately two or three weeks, and the Wells had met the appellant on one other occasion. They agreed to drive to the club together in the Wells' car.

At Cotton Eyed Joe's, the appellant and Mr. Wells drank heavily. The appellant drank at least one dozen "long-neck" Budweiser beers, and Mr. Wells was drinking Budweiser and Jack Daniels whiskey. At some point, the appellant began to argue with Ms. Hurst, and, as a result of this argument, the group left the club. In the parking lot, the appellant and Mr. Wells began to argue, and the argument continued during the return drive to Ms. Hurst's apartment.

Mrs. Wells testified at trial that, during this drive, the appellant told Mr. Wells, "I'm going to cut your head off." The appellant then attempted to strike Mr. Wells. According to Mrs. Wells, her husband was "keeping his cool" during the argument.

Ms. Hurst testified at trial that, during the drive home, the appellant told Mr. Wells, "I'm going to kill ye." Ms. Hurst recounted, "[T]hat's when they was, fixing to swap licks, and I got between them." On cross-examination, Ms. Hurst conceded that she had previously told the police that Mr. Wells had shoved the appellant's head against a rear window of the car.

The group arrived in the parking lot of Ms. Hurst's apartment complex around midnight. Despite Mrs. Wells' protests, Mr. Wells immediately exited the car and walked toward Ms. Hurst's apartment. Ms. Hurst testified that she and the appellant also exited the car and followed Mr. Wells toward her apartment, at which time the appellant and Mr. Wells resumed their argument. The appellant again threatened to kill Mr. Wells, who responded, "Well, I'll get you." According to Ms. Hurst, Mr. Wells began to walk away, but the appellant continued to threaten him. Mr. Wells approached the appellant, and Ms. Hurst was forced to intervene.

The appellant then entered Ms. Hurst's apartment. According to Ms. Hurst's babysitter, the appellant's speech was slurred and he appeared angry. The appellant

walked into a bedroom. When he returned, he appeared calmer but was still angry and soon “started yelling again.” The appellant had retrieved a knife from the bedroom and told the babysitter that he was “going to kill them.” He invited the babysitter to watch. The babysitter denied that the appellant appeared frightened.

Ms. Hurst testified that, when the appellant returned outside, he and Mr. Wells “swapped licks.” Both Mrs. Wells and Ms. Hurst testified that the appellant hit Mr. Wells first. Mrs. Wells at some point drove to a nearby gas station in order to call her husband’s brother for help and because she needed gas. Meanwhile, according to Ms. Hurst, the appellant drew a knife and stabbed Mr. Wells several times.

After the stabbing, the appellant ran behind the apartment building. Soon thereafter, he reappeared at Ms. Hurst’s front door and forced his way into her apartment. He showered in order to wash away Mr. Wells’ blood and, at Ms. Hurst’s request, left her apartment, taking with him several cassette tapes that belonged to him. Ms. Hurst testified on cross-examination that the appellant was drunk and very upset.

En route to his apartment, the appellant encountered an ex-girlfriend, Tanya Cole, and asked that she and a friend follow the appellant to his apartment. At his apartment, the appellant asked Ms. Cole and her friend to dispose of his bloody clothing. Ms. Cole testified that the appellant was intoxicated, his speech was slurred, and he was “staggering everywhere.” The police subsequently arrested the appellant at his apartment.

Dr. Sandra Elkins, the Director of Autopsy Services and Forensic Pathology at the University of Tennessee Medical Center and the Knox County Medical Examiner, testified that she performed an autopsy on the victim. She determined that the victim had suffered three stab wounds, including stab wounds to the chin, neck, and chest. Dr. Elkins did not observe any other injuries on Mr. Wells’ body. However, the stab wound to the neck incised the carotid artery and the arch of the aorta, a major blood vessel connected to the heart. Dr. Elkins determined that this wound would have resulted in rapid blood loss followed by death within five or ten minutes. She also opined that the wounds to the chin and neck were inflicted by a single thrust of the knife. With respect to the wound to the neck, Dr. Elkins testified that the knife was fully inserted to the hilt into the victim’s neck with moderate to severe force. At the time of his death, the victim had a blood alcohol concentration of .15.

During the State’s case-in-chief, the victim’s wife testified that she had previously told the police that her husband had been “in arguments and fights before and everything calmed down.” Mrs. Wells explained that, when she drove to the gas

station on the night of the murder, she knew that there would be a fight, but “nothing drastic.” She stated that her husband did not like to fight, “[h]e just runs his mouth.”

The appellant subsequently recalled Mrs. Wells as a witness during the presentation of his proof. She testified that she had filed a petition for an order of protection against her husband on January 14, 1994. In the petition, she alleged that her husband had struck her while she was holding her son and threatened to blow her head off. Her husband was drinking on that occasion. She also testified that her husband had pushed her on at least one other occasion. She concluded that she and her husband had resolved their marital problems at the time of the murder.

The appellant testified on his own behalf. He stated that, on the night in question, he was “scared” and “drunk.” He admitted stabbing Mr. Wells, but claimed that he was only attempting to protect himself. He further testified that he could only recall stabbing Mr. Wells once. He could not recall going into Ms. Hurst’s apartment in order to retrieve his knife. He also could not recall showering after the murder or asking his ex-girlfriend to dispose of his clothing.

In rebuttal, the State introduced into evidence the appellant’s statement to the police approximately four and one half hours after the stabbing. Detective Michael Hyde testified that the appellant was fully advised of his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and the appellant signed a written waiver of his rights. According to Detective Hyde, the appellant did not appear to be drunk at the time of his statement. The appellant told the police the following account:

Well, we went down to Cotton Eyed Joe’s, ah, we was out there dancing, having a good time, and the guy, he started talk, started talking and getting violent, and started talking about, he wanted to do, was fight. So we, so me and my girl friend and his wife and him, we all got back in the car, after she coaxed him into leaving, we went back to, ah, my, my girl friend’s apartment. All the way down the freeway he did, all he wanted to do was, they tried to coax him, they tried to calm him down. He started jumping over the seat. He pushed my head against the window. I told him, “Man, I don’t want to fight,” and I said, “I have nothing to fight about.” “I have nothing against you or your wife or nobody else.” He kept saying, “Well, when we get out of the car I’m going to stomp your ass,” all this, and I told him, “Man, I don’t want, I don’t know why, I haven’t done anything to you or nobody else.” “You all asked us to go out with you.” “You all told my girl friend, if we wanted to go out and all, all she had to do was page you all and we, when we got in from work.”

After we got back to my apartment my, my girl friend's apartment, before the car stops, he jumps out. He runs up the hill and he stands by the rail and waits till I get up the hill. When he comes up there my girl friend tried to get him to go back to the car so they could go home.

Well, he kept, he kept on and kept on. I went into my apartment, mine and my girl friend's apartment. I got my knife. I told him to go, go home - -

. . . .

"All I can remember is swinging the knife at him twice. From then on he took off running."

The State also recalled the appellant's ex-girlfriend, Tonya Cole, to the witness stand. She testified that a week and one half before the stabbing, she was dating the appellant. At the same time, a former boyfriend, Leonard Keen, was attempting to reconcile with Ms. Cole. The appellant threatened to kill Mr. Keen with a knife. Ms. Cole identified the murder weapon in this case as the same knife with which the appellant had threatened Mr. Keen.

Billy Joe Henderson, 1999 WL 398087, at *1-4.

On direct appeal, the petitioner argued that: (1) the trial court erroneously admitted testimony of prior violent conduct by the petitioner; (2) the trial court erroneously prohibited the petitioner from impeaching a witness with prior inconsistent statements; (3) the trial court erroneously declined to conduct a hearing on the voluntariness of the petitioner's statement; (4) the trial court erroneously ruled that the defense investigator was subject to Tennessee Rule of Evidence 615; and (5) the trial court erroneously instructed the jury on the release eligibility dates for the charged offenses. This Court affirmed the conviction and the Supreme Court denied permission to appeal. Id. at *1.

On December 1, 2000, the petitioner filed a pro se petition for post-conviction relief. In the petition, the petitioner raised six issues. The first five issues were identical to the issues raised on direct appeal. The final issue alleged that the petitioner received ineffective assistance of counsel on appeal because counsel failed to raise sufficiency of the evidence as an issue on direct appeal. The post-conviction court dismissed the petition, determining that the petitioner failed to present a colorable claim and that the issues had been previously litigated on direct appeal. This Court affirmed the post-conviction court's dismissal of issues one through five, but reversed the post-conviction court's dismissal of issue six, determining that the petitioner had stated a colorable claim in regards to ineffective assistance of counsel based on the failure to raise sufficiency of the evidence. Billy Joe Henderson, 2001 WL 1464544, at *3. On remand, this Court instructed the post-conviction court to hold an evidentiary hearing on the petition. Id.

Evidence at the Post-Conviction Hearing

At the hearing, the petitioner's trial counsel, who also represented the petitioner on appeal, testified that she had been an attorney since 1991 and was appointed to represent the petitioner at trial. Counsel did not represent the petitioner at the preliminary hearing stage of the proceedings. Counsel testified that she had handled criminal cases in both federal and state courts on both the trial and appellate level prior to the petitioner's trial.

According to counsel, she initially interviewed both the petitioner and all the witnesses that would talk to her. Based on her initial assessments, counsel determined that a self-defense theory would probably be the best defense at trial. Then counsel attempted to obtain background information about the victim's past, which included an extensive history of domestic abuse and violence.

Prior to trial, counsel reviewed the preliminary hearing tape and filed several motions. Counsel successfully sought funds for an investigator who assisted her in interviewing witnesses. Counsel also filed a motion asking the State to disclose any impeaching information about the petitioner. Counsel recalled that this was an important issue as the petitioner had been charged in Arkansas with stabbing someone. There was also potential testimony about a threat the petitioner made with a knife a few days prior to the victim's stabbing death. Counsel eventually filed a motion in limine regarding the charge for aggravated assault in Arkansas. The trial court granted the motion. Counsel also successfully argued a motion in limine to exclude photographs of the victim's body from the jury.

Counsel testified that she also filed a motion to suppress the petitioner's statement in which he confessed to stabbing the victim. Counsel felt that there were significant questions regarding the voluntariness of the confession. However, a hearing was never held on that particular issue.

In order to prepare for trial, counsel testified that she talked to witnesses including the arresting officers and reviewed all of the physical evidence collected at the scene. Counsel also recalled talking to the pathologist and meeting with the petitioner several times. Counsel attempted to meet with the petitioner's family members who lived in Arkansas, but they were unwilling to travel to Tennessee. Counsel talked with the family members via telephone despite their unwillingness to travel.

During her meetings with the petitioner, counsel stated that they discussed the petitioner's educational background and work history. Counsel described the petitioner as a voluminous letter writer who was quite literate. Counsel recalled that the petitioner admitted he had a serious alcohol problem and that the majority of his legal problems stemmed from occasions where he was intoxicated. During conversations with the petitioner, counsel felt there was no reason to consider a mental health defense. Counsel stated that she saw no evidence of delusions or psychosis and specifically commented that the petitioner's actions at the time of the crime in which he "made all

these steps after the homicide to cover the crime” and the “devastating” testimony from the babysitter supported her decision not to seek a psychological evaluation.

In regards to a motion to suppress the evidence, counsel stated that she did not feel that a motion to suppress would have been successful because the situation was a “classic hot-pursuit” case. Additionally, counsel stated that she did not pursue the sufficiency of the evidence on direct appeal because she felt that the petitioner had a “very good appellate issue” in challenging the testimony of the babysitter in which the babysitter was allowed to testify about a totally unrelated incident that occurred before the homicide where the petitioner allegedly pulled a knife on another man. In other words, counsel did not feel that the sufficiency of the evidence was a meritorious issue on appeal.

The petitioner called Officer Benny Mitchell in support of his post-conviction petition. Officer Mitchell testified that he received a dispatch on the date of the incident in which he was given the petitioner’s description and possibly the petitioner’s name. When Officer Mitchell arrived at the scene, he saw blood on the porch and on the door. Officer Mitchell later encountered two females who gave information as to the petitioner’s whereabouts. The officers proceeded to that apartment and knocked on the door. The petitioner answered the door and was taken into custody. Officer Mitchell stated that when the petitioner opened the door, he saw a box in plain view that contained bloodstained articles and a knife.

Officer Edward Kingsbury also testified at the post-conviction hearing. He stated that he was on patrol the evening of the incident when he got a call about a stabbing. Officer Kingsbury arrived on the scene and saw the victim lying on the ground in a pool of blood. Several people were yelling and screaming and telling the officers that the petitioner committed the crime. The officers received information that the petitioner was hiding in a nearby apartment. As they knocked on the door to the apartment, the petitioner opened the door and was taken into custody. Officer Kingsbury testified that the petitioner’s boots and a knife were found inside the apartment.

At the conclusion of the hearing, the post-conviction court took the matter under advisement. The post-conviction court subsequently dismissed the petition for post-conviction relief, determining that:

[Counsel] did an excellent job of representing this defendant, it was more than adequate to meet the standards of care, and that she was not ineffective in her representation of [the petitioner]. The warrantless arrest and the search and seizure of property after a hot pursuit when the defendant is clearly trying to dispose evidence would not have been suppressed and failure to raise those grounds was a tactical decision of the attorney, the adequacy of the evidence was clear and the failure to obtain a psychological evaluation has not been shown to the Court to be any grounds for post-conviction relief at this time nor has there been any showing that a psychological evaluation was ever warranted. [Counsel] has not only met but has exceeded the effectiveness of counsel obligations and this post-conviction petition is hereby respectfully denied.

The petitioner subsequently appealed. On appeal, the petitioner challenges the post-conviction court's denial of the petition.

Analysis

On appeal, the petitioner contends that his counsel was ineffective because she: (1) failed to file a motion to suppress the evidence obtained following his warrantless arrest and warrantless search and seizure; (2) failed to have a psychological evaluation performed; and (3) failed to raise the sufficiency of the evidence as an issue on direct appeal. The petitioner also argues that his constitutional rights were violated by the warrantless arrest and warrantless search and seizure of his home. The State submits that the post-conviction court properly concluded that the petitioner received effective assistance of counsel and that his constitutional rights were not violated.

Post-Conviction Standard of Review

To sustain a petition for post-conviction relief, a defendant must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issues raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the trial court's findings unless the evidence in the record preponderates against those findings. See Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997); Alley v. State, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. See State v. Honeycutt, 54 S.W.3d 762, 766 (Tenn. 2001). All questions concerning the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578-79. However, the post-conviction court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001).

Ineffective Assistance of Counsel

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. See Powers v. State, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). In order to demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. See Strickland v. Washington, 466 U.S. 668, 694 (1984). "Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to

prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim.” Henley, 960 S.W.2d at 580.

As noted above, this Court will afford the post-conviction court’s factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court’s findings. See id. at 578. However, our supreme court has “determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is de novo” with no presumption of correctness. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999).

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. See Adkins v. State, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. See id. However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. See Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

A. Failure to File a Motion to Suppress

First, the petitioner contends that counsel was ineffective for failing to move to suppress the evidence seized as a result of both a warrantless search of his home and a warrantless arrest inside the home and that his due process rights were violated as a result of the search and arrest.

In denying the petition, the post-conviction court gave credibility to the testimony of trial counsel and determined that, based on the evidence, there was little likelihood for success at a hearing on a motion to suppress. After hearing testimony from counsel and from the police officers who arrested the petitioner, the post-conviction court determined that, “the warrantless arrest and the search and seizure of property after a hot pursuit when the defendant is clearly trying to dispose evidence would not have been suppressed and failure to raise those grounds was a tactical decision of the attorney.” Indeed, the police officers testified that witnesses at the scene implicated the petitioner and informed the officers as to the petitioner’s whereabouts. When the officers located the petitioner, a box containing a knife and bloody articles was in plain view. As stated above, “questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trial of fact” and the post-conviction court’s credibility determinations are conclusive on appeal unless the evidence preponderates against them. State v. Odom, 928 S.W.2d 18, 23 (Tenn.1996). The evidence does not preponderate against the post-conviction court’s credibility determinations herein. The petitioner has failed to prove by clear and convincing evidence that trial counsel was ineffective in the failing to file a motion to suppress. This issue is without merit.

B. Failure to Seek Psychological Evaluation

Next, the petitioner complains that counsel was ineffective for failing to seek a psychological evaluation in order to determine the petitioner's state of mind at the time of the crime and to present evidence challenging premeditation. The State argues that there was no ineffective assistance of counsel where a psychological evaluation was unwarranted.

Upon review of the record, we conclude that the evidence presented on appeal does not preponderate against the findings of the post-conviction court. Counsel testified that the petitioner gave her no indication of mental problems. The post-conviction court determined that there was no indication that a psychological evaluation was warranted. Moreover, the testimony reveals that the lines of communication were open and used by both the petitioner and his counsel, allowing the petitioner to make well-informed decisions and assist in his defense. In fact, counsel commented on the length and frequency of written communication from the petitioner in regards to his case. Further, petitioner's counsel conceded at the post-conviction hearing that he could not establish this claim regarding the lack of a psychological evaluation and that he was unable to show prejudice. In sum, the petitioner has failed to show by clear and convincing evidence that counsel's failure to request a mental evaluation prior to his trial constituted deficient performance. Further, trial counsel's performance cannot be deemed deficient for failure to secure a mental evaluation in the absence of a factual basis to support a mental evaluation. See Charles William Young v. State, No. M2002-01815-CCA-R3-PC, 2004 WL 305790 (Tenn. Crim. App., at Nashville, Feb. 18, 2004); Edward A. Wooten v. State, No. 01C01-9702-CC-000067, 1998 WL 255440 (Tenn. Crim. App., at Nashville, May 21, 1998), perm. app. denied, (Tenn. 1999). We conclude that the petitioner has failed to demonstrate that counsel was ineffective for failing to pursue a psychological evaluation. This issue is without merit.

C. Failure to Raise Sufficiency of the Evidence on Direct Appeal

Finally, the petitioner contends that counsel was ineffective for failing to raise the sufficiency of the evidence as an issue on direct appeal. The State disagrees.

In Johnson v. State, 733 S.W.2d 525 (Tenn. Crim. App. 1987), and Rhoden v. State, 816 S.W.2d 56 (Tenn. Crim. App. 1991), this Court stated, "as it currently stands the sufficiency of the evidence is not reviewable in a post-conviction case," and that "[t]he determination of which issues to present on appeal is a matter of counsel's discretion." State v. Swanson, 680 S.W.2d 487, 491 (Tenn. Crim. App. 1984). Further, the "the failure of counsel for a criminal defendant to argue every single issue that a case may present or to present every issue in an appeal that a client may request is not per se ineffective assistance of counsel." See id. at 491.

However, we must evaluate the questionable conduct from counsel's perspective at the time of her conduct with "a strong presumption that [her] conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; Strickland, 466 U.S. at 690. Furthermore, counsel should not be deemed to have been ineffective merely because a different

procedure or strategy might have produced a different result. Williams v. State, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). Moreover, this Court has held that “[c]ounsel is not constitutionally required to argue every issue on appeal, or to present issues chosen by his client The determination of which issues to present on appeal is a matter of counsel’s discretion.” Swanson, 680 S.W.2d at 491.

We conclude that counsel was not ineffective by failing to raise the issue of the sufficiency of the convicting evidence on appeal. Counsel testified at the post-conviction hearing that she decided that the issue of the sufficiency of the convicting evidence was not a viable issue to raise on appeal. Counsel recalled that she made the strategic decision to focus the appeal on what she perceived to be the strongest argument on appeal. Counsel determined that the petitioner had a “very good appellate issue” in challenging the testimony of the babysitter in which the babysitter was allowed to testify about a totally unrelated incident that occurred before the homicide where the petitioner allegedly pulled a knife on another man. In other words, counsel did not feel that the sufficiency of the evidence was a meritorious issue on appeal. Thus, from the testimony, it appears that counsel adequately considered potential issues to raise on appeal and concluded that the issue of the sufficiency of the convicting evidence lacked merit. Counsel’s decision not to raise the issue of the sufficiency of the convicting evidence on appeal fell “within the wide range of reasonable assistance.” Burns, 6 S.W.3d at 462. Counsel made a tactical decision to focus this Court’s attention on the issue of the introduction of the babysitter’s testimony and, while she was unsuccessful, counsel should not be deemed to have been ineffective merely because a different strategy might have produced a different result. Williams, 599 S.W.2d at 279-80.

Moreover, even if we were to find that counsel’s performance in failing to raise the issue of the sufficiency of the convicting evidence on appeal was deficient, the petitioner has presented no evidence of prejudice or that the outcome would have been different had sufficiency of the evidence been raised on direct appeal. In fact, this Court mentioned the issue of the sufficiency of the convicting evidence in the direct appeal by commenting that the State made a strong case against the petitioner by presenting “strong proof of premeditation and deliberation.” Henderson, 1999 WL 398087, at *17. Accordingly, we conclude that the petitioner failed to meet his burden of proving that he was prejudiced by counsel’s failure to raise the issue of the sufficiency of the convicting evidence on appeal. The petitioner failed to show a reasonable probability that, but for counsel’s failure to raise the issue of the sufficiency of the convicting evidence on appeal, this Court would have found that the evidence was insufficient to “undermine confidence in the outcome.” Strickland, 466 U.S. at 694. This issue is without merit.

Conclusion

For the foregoing reasons, the judgment of the post-conviction court is affirmed.

JERRY L. SMITH, JUDGE